

In the Matter of the Compensation of
STEVEN D. LOSS, Claimant

WCB Case No. 14-01052

ORDER ON REVIEW

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Reviewing Panel: Members Lanning and Curey.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) set aside a Notice of Closure and Order on Reconsideration as nullities; and (2) declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are claim processing, penalties, and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

In 2008, claimant sustained a compensable injury to his left arm. (Ex. 3). The insurer accepted left lateral and medial epicondylitis conditions. (Ex. 20).

A February 17, 2010 Notice of Closure awarded 8 percent whole person impairment and 23 percent work disability. (Ex. 104). A May 19, 2010 Order on Reconsideration affirmed the Notice of Closure. (Ex. 113).

On June 22, 2010, claimant began a vocational training program. (Ex. 115-2). In September 2010, he experienced left arm difficulties, which interrupted the training. (Ex. 121). On December 1, 2010, Dr. Lauder, his attending physician, took claimant off work. (Exs. 131, 135, 136). On December 14, 2010, Dr. Lauder performed left cubital tunnel surgery. (Ex. 137).

Claimant resumed training in February 2011, but further medical difficulties resulted in additional interruptions. (Ex. 207-1). On June 26, 2012, Dr. Lauder performed a neurolysis procedure involving the radial and posterior interosseous nerves in claimant's left elbow. (Ex. 186).

On November 2, 2012, Dr. Lauder released claimant to return to work. (Ex. 203). He also stated that claimant's post-surgical left upper extremity conditions were medically stationary. (*Id.*) Claimant resumed training, but, due to problems at the training site, Ms. Hill, the vocational counselor, ended the training program, effective January 31, 2013. (Exs. 208, 212-1).

During a March 7, 2013 examination, claimant told Dr. Lauder that he was unable to flex his left wrist. (Ex. 210). After performing an examination, Dr. Lauder maintained his opinion that claimant's post-surgical left upper extremity conditions were medically stationary and recommended a functional capacity evaluation. (*Id.*)

On July 11, 2013, Mr. Trash, an occupational therapist, performed a physical capacity evaluation and reported claimant's left arm findings. (Ex. 218). On October 18, 2013, Dr. Lauder confirmed that claimant's accepted left lateral and medial epicondylitis conditions had been medically stationary since March 7, 2013. (Ex. 224-1). Dr. Lauder agreed with Mr. Trash's findings for purposes of claim closure. (*Id.*)

On October 23, 2013, the insurer submitted a 1502 form, reporting that it had reopened the claim for vocational training on June 22, 2010. (Ex. 225). An October 24, 2013 Notice of Closure awarded 25 percent whole person impairment and 40 percent work disability. (Ex. 231). Claimant requested reconsideration. (Ex. 232).

Shortly thereafter, on November 25, 2013, the insurer issued a Modified Notice of Acceptance stating that it was "now accepting [claimant's] claim for an AGGRAVATION of [claimant's] left lateral and medial epicondylitis effective December 1, 2010."¹ (Ex. 237) (emphasis in original). The insurer also submitted a 1502 form, reporting that it had received the aggravation claim on December 1, 2010, and acknowledging that its acceptance was not timely. (Ex. 237-6).

A November 27, 2013 Order on Reconsideration affirmed the October 24, 2013 Notice of Closure's award of 25 percent whole person impairment, but increased the work disability award to 55 percent.² (Ex. 239-4).

On December 17, 2013, the insurer issued another Notice of Closure, which pertained to its November 25, 2013 Modified Notice of Acceptance and 1502 form.³ Before doing so, the insurer did not seek a closing examination or current information regarding claimant's compensable condition. This Notice of Closure did not award additional temporary or permanent disability. (Ex. 244).

¹ As previously noted, Dr. Lauder took claimant off work, effective December 1, 2010.

² Claimant requested a hearing, which is the subject of separate litigation.

³ The accompanying 1503 form reported that the claim was being closed for a condition referred to in ORS 656.262(7)(c). (Ex. 243).

Claimant's request for reconsideration raised premature claim closure and temporary disability issues. (Ex. 247). A March 4, 2014 Order on Reconsideration rescinded the December 17, 2013 Notice of Closure on the basis that there was insufficient information to close the claim under OAR 436-030-0020(1) and (2). (Ex. 248). Claimant requested a hearing, seeking penalties and attorney fees.

CONCLUSIONS OF LAW AND OPINION

The ALJ vacated the December 17, 2013 Notice of Closure and the March 4, 2014 Order on Reconsideration. In doing so, the ALJ determined that the October 24, 2013 Notice of Closure included the aggravation claim. Accordingly, the ALJ concluded that the December 17, 2013 Notice of Closure and the March 4, 2014 Order on Reconsideration were legal nullities. The ALJ awarded an ORS 656.262(11)(a) "penalty-related" attorney fee, but, finding no evidence that the insurer's conduct resulted in a delay in compensation, did not award a penalty.⁴

On review, claimant seeks reinstatement of the March 4, 2014 Order on Reconsideration. Asserting that the insurer's issuance of the December 17, 2013 Notice of Closure was unreasonable, claimant also seeks an ORS 656.268(5)(d) penalty and ORS 656.382(1) attorney fee. We reinstate the March 4, 2014 Order on Reconsideration, but, for the following reasons, conclude that the requested penalties and attorney fees are not warranted.

If a condition is "found compensable" after claim closure, ORS 656.262(7)(c) compels the insurer to reopen the claim for processing regarding that condition. Thus, the question here is whether a condition was "found compensable" such that the insurer was required to reopen the claim for processing.

Here, after the October 24, 2013 closure, the insurer issued a modified acceptance notice stating that it was "now accepting" an aggravation of claimant's left lateral and medial epicondylitis, effective December 1, 2010. (Ex. 237). That acceptance established the compensability of claimant's then-current conditions. *See Jeld Wen, Inc. v. Cooper*, 270 Or App 186, 192 (2015) (the compensability of the claimant's injury was established by the employer's acceptance of the

⁴ The ALJ also awarded an attorney fee under ORS 656.262(11)(a) for unreasonable "post-closure claims processing" and a penalty and another attorney fee under ORS 656.262(11)(a) for the insurer's failure to pay an "out-of-compensation" attorney fee awarded in the November 27, 2013 Order on Reconsideration. Those penalty and attorney fee awards are not disputed.

claimant's claim for a left ankle strain related to that injury); *Eleanor I. Crockett*, 51 Van Natta 950 (1999) (defining "acceptance" as an act through which the insurer acknowledges responsibility for the claim and obligates itself to provide benefits due under the law); *Gene C. Dalton*, 43 Van Natta 1191 (1991) (same).

Because the aforementioned conditions were "found compensable after claim closure," ORS 656.262(7)(c) applied. Under ORS 656.262(7)(c), the insurer was required to reopen the claim for processing regarding those conditions.

The insurer argues that it processed the accepted conditions prior to the October 24, 2013 closure, making the December 17, 2013 Notice of Closure unnecessary.⁵ We disagree.

The insurer's acceptance provided an "effective" date of December 1, 2010. (Ex. 237). We acknowledge that the "effective" date established that the acceptance was retroactive to a period included within the October 24, 2013 closure.⁶ However, while the insurer may have intended the "reopened" conditions to be part of that closure, the modified acceptance issued *after* the October 24, 2013 closure. Furthermore, the modified acceptance expressly provided that the insurer was "now" accepting those conditions. (Ex. 237).

As noted, the insurer's acceptance of the aggravation claim related to periods that were both before and after the October 24, 2013 Notice of Closure. In accepting conditions after the October 24, 2013 closure, the insurer was compelled to reopen the claim for processing. ORS 656.262(7)(c). Moreover, the insurer recognized this statutory obligation in its 1503 form, reporting that the December 17, 2013 Notice of Closure was for a condition referred to in ORS 656.262(7)(c). (Ex. 243).

Therefore, because the insurer was required under ORS 656.262(7)(c) to reopen the claim to process the current accepted conditions, the December 17, 2013 Notice of Closure and the March 4, 2014 Order on Reconsideration were not

⁵ The insurer explains that it issued the December 17, 2013 Notice of Closure "in response to the November 25, 2013 Modified Notice of Acceptance." (Resp. Br., p. 3).

⁶ The October 24, 2013 Notice of Closure awarded temporary disability benefits from December 1, 2010 through March 7, 2013. (Ex. 231). On July 18, 2014, a subsequent ALJ's order awarded temporary disability benefits through the October 24, 2013 closure of the claim.

“nullities.”⁷ Because the March 4, 2014 Order on Reconsideration is not otherwise contested, the reconsideration order’s rescission of the December 17, 2013 Notice of Closure as premature is reinstated.

Because our order may result in increased compensation, claimant’s attorney is entitled to an “out-of-compensation” attorney fee equal to 25 percent of the increased temporary disability compensation, if any, created by this order, not to exceed \$5,000, payable directly to claimant’s counsel. ORS 656.386(4); OAR 438-015-0055(1).

We turn to claimant’s request for an ORS 656.268(5)(d) penalty. Such a penalty is assessed if: (1) the carrier has closed a claim or refused to close a claim pursuant to ORS 656.268; (2) the correctness of that notice of closure or refusal to close is at issue in a hearing on the claim; and (3) a finding is made at the hearing that the notice of closure or refusal to close was not reasonable. *See Cayton v. Safelite Glass Corp.*, 232 Or App 454, 460 (2009); *David J. Morley*, 66 Van Natta 2052, 2055 (2014).

Here, the insurer closed the claim on December 17, 2013, and the correctness of that closure was at issue in the hearing. Although the ALJ did not make a finding that the December 17, 2013 Notice of Closure was not reasonable, we have *de novo* review authority to decide such matters. *See* ORS 656.295(6); *Indalecio Gonzalez*, 54 Van Natta 1164, 1170 (2002) (applying *de novo* review in the absence of an ALJ finding, the Board found the carrier’s refusal to close a claim to be unreasonable).

Claimant argues that the December 17, 2013 Notice of Closure was not reasonable because the insurer had no legitimate doubt that it was required to obtain new impairment findings, or a new attending physician opinion that there were no additional findings, for the “reopened” conditions, before it was authorized to close the claim. ORS 656.268(1)(a); OAR 436-030-0020(1), (2). For the following reasons, under the facts presented in this particular case, we do not find the insurer’s issuance of the December 17, 2013 Notice of Closure to have been unreasonable.

ORS 656.268(1)(a) provides that a carrier shall close the worker’s claim and determine the extent of the worker’s permanent disability when “[t]he worker has become medically stationary and there is sufficient information to determine permanent disability[.]” Whether the insurer acted reasonably in closing the claim

⁷ The fact that the October 24, 2013 Notice of Closure awarded time loss that would/could have been due in an eventual Notice of Closure of the claim for the subsequently accepted claim does not satisfy the insurer’s obligation to separately process that “post-closure” accepted claim to closure.

must be evaluated based on information available to it at the time of the closure. *Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991); *Morley*, 66 Van Natta at 2056.

Here, the information available to the insurer at the time of the December 17, 2013 closure addressed claimant's condition as of October 18, 2013. (Ex. 224). On that date, Dr. Lauder, claimant's attending physician, opined that claimant's left arm conditions had been medically stationary since March 7, 2013.⁸ (Ex. 224-1). Dr. Lauder also ratified Mr. Trash's July 11, 2013 impairment findings for claim closure purposes. (*Id.*)

After the October 24, 2013 closure, the insurer recognized that it had not accepted the aggravated left lateral and medial epicondylitis conditions. (Ex. 237-6). On November 25, 2013, the insurer issued its acceptance of the aggravation conditions, retroactively to December 1, 2010. (Ex. 237-1). The record does not show any treatment or change in claimant's conditions after March 7, 2013.

Under these particular circumstances, we find that the insurer had a legitimate doubt regarding its responsibility to garner further "closing examination" information before re-closing the claim on December 17, 2013. The insurer had just closed the claim on October 24, 2013 (at the end of the vocational program) based on claimant's accepted lateral and medial epicondylitis conditions. Thereafter, to correct its claim processing oversight, the insurer issued a Modified Notice of Acceptance to retroactively accept claimant's aggravated conditions. Considering the evidence the insurer had at that time (*i.e.*, Dr. Lauder's March 7, 2013 statement that the accepted conditions were medically stationary, the July 11, 2013 physical capacities evaluation findings, Dr. Lauder's October 18, 2013 confirmation that the accepted conditions remained medically stationary and agreement with the findings for purposes of claim closure, and no evidence of treatment after March 7, 2013), it was not unreasonable for the insurer to rely on that evidence, without seeking additional evidence, in re-closing the claim on December 17, 2013.⁹

⁸ The accepted conditions under this claim are left lateral and medial epicondylitis.

⁹ Arguably, between October 18, 2013 and December 17, 2013, claimant's accepted conditions could have required treatment, but the current record gave the insurer no reason to believe that there had been any treatment or change in claimant's conditions after March 7, 2013.

Accordingly, we do not consider the insurer's issuance of the December 17, 2013 Notice of Closure to have been unreasonable. Consequently, a penalty under ORS 656.268(5)(d) is not warranted. In light of this conclusion, we likewise conclude that an attorney fee award under ORS 656.382(1) is not appropriate.

ORDER

The ALJ's order dated September 18, 2014 is reversed in part and affirmed in part. That part of the ALJ's order that vacated the December 17, 2013 Notice of Closure and March 4, 2014 Order on Reconsideration is reversed. The March 4, 2014 Order on Reconsideration is reinstated and the claim is remanded to the insurer for processing according to law. Claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation, if any, resulting from this order, not to exceed \$5,000, payable by the insurer directly to claimant's counsel. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on July 6, 2015